

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN**

**JACK COOPER TRANSPORT
COMPANY, INC.**

Employer

and

Case 07-RC-142973

**LOCAL 580, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS ¹**

Petitioner

APPEARANCES:

Daniel R. Begian, Attorney, of St. Louis, Missouri, and David Thatcher, Attorney, of Atlanta, Georgia, for the Employer.

James F. Wallington, Attorney, of Washington, D.C., for the Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer is engaged in the intrastate and interstate transportation of motor vehicles. The Petitioner seeks to represent a unit of all full-time and regular part-time dispatch/terminal supervisors and yard/load supervisors employed by the Employer at its Dimondale facility.

The parties disagree on the appropriateness of the unit. The Petitioner contends that the dispatch/terminal supervisors and yard/load supervisors are not supervisors under the Act but are employees, and constitute an appropriate unit.

The Employer contends that it is not an appropriate unit because the dispatch/terminal supervisors and yard/load supervisors are statutory supervisors under Section 2(11) of the Act. The Employer asserts that dispatch/terminal supervisors and yard/load supervisors are supervisors primarily because they have the authority to assign work, responsibly direct employees, and issue discipline.

¹ The Petitioner's name appears as amended at hearing.

I have considered the evidence and the arguments presented by the parties on these issues.² As discussed below, I have concluded that the disputed individuals are not supervisors and therefore constitute an appropriate unit.

I. ANALYSIS

A. Board Law

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

Consistent with *Kentucky River*, the Board in *Oakwood Healthcare*, 348 NLRB 686 (2006), adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Id.* at 692. “[A]ctions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board instructed that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

² At hearing the Petitioner requested that I take administrative notice of a Decision and Direction of Election in Case 14-RC-132667, issued on August 22, 2014, involving the Employer herein and the Automobile Transport Chauffeurs, Demonstrators, Helpers, Teamsters Local 604, in which dispatch supervisors and yard supervisors, among other classifications, were found not to be supervisors under the Act. Neither party established that the dispatch or yard supervisors in 14-RC-132667 had identical or substantially similar duties and authority to the dispatch/terminal supervisors and yard/load supervisors at issue in this case, therefore while I agree to take administrative notice, such notice is of little probative value.

The burden to prove supervisory authority is on the party asserting it. *Kentucky River*, supra, at 711-712. Purely conclusionary evidence is not sufficient to establish supervisory status. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). Evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), enfd. in relevant part 156 F. Ed 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). See also, *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012) enfg. 356 NLRB No. 94 (2011).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. Id. ; *Golden Crest Healthcare*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000), *Frenchtown Acquisition*, supra at 308. The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital - Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

B. Application of Board Law to this Case

1. OVERVIEW

The Employer transports post-production General Motors (GM) vehicles to various automobile dealerships and railhead locations throughout the United States and Canada out of its Dimondale facility. The facility consists of a terminal and two loading yards. The CN or Delta yard is located on Davis Highway across the street from the GM Delta Township Assembly Plant and the LGR yard is located behind the GM Lansing River Assembly Plant. The CN yard and LGR yard are two miles and seven miles from the Employer's terminal, respectively. The yards are essentially holding areas for vehicles fresh off the GM assembly lines prior to their transport to dealerships and railhead locations across the country. Autoport³, a company contracted by GM, performs yard management at both the LGR yard and the CN yard, maintaining a staff of employees at both yards that move post-production vehicles out of the GM assembly plants and prepare them for transport by the Employer's drivers via semi-trailer trucks.

At its Dimondale facility the Employer employs terminal manager Torren White, two assistant terminal managers, Margo Hopkins and Dean Ellenburg, and a Maintenance Supervisor,

³ The full legal name of Autoport was not provided at hearing.

Joshua Hyland.⁴ The Employer also employs a payroll clerk, Rhonda Radee.⁵

The terminal manager, assistant terminal manager and maintenance supervisor predominantly perform their duties in offices located within the terminal. In addition to these offices, the terminal contains a dispatch area and a vehicle repair facility where the Employer's transport trucks are repaired. The terminal manager is responsible for the overall operations of the Dimondale facility. The assistant terminal managers report directly to the terminal manager and assist him in his oversight of the operations. The maintenance supervisor oversees the terminal's vehicle repair facility.

In addition, the Employer employs 15 maintenance mechanics and 127 drivers at the Dimondale facility. They are currently represented by the Petitioner. Three agreements govern their terms and conditions of employment: The National Master Automobile Transporters Agreement (Master Agreement); Central and Southern Areas Supplemental Agreement (Supplemental Agreement); and the Local Rider Agreement (Local Rider), collectively, collective bargaining agreements.

There are six employees in the petitioned-for unit: three dispatch/terminal supervisors and three yard/load supervisors.

The dispatch/terminal supervisors work almost exclusively at the terminal, stationed in the same large open office as management and clerical personnel. Their principle duty is to "build loads"—to create a load of vehicles for shipment that best utilizes the capacity of the semi-trailers. This load building is often performed on a computer but can be done manually on one of six "dispatch boards," with some boards representing the delivery destination while other boards distinguish loads between morning and afternoon shipments.

The information used by a dispatch/terminal supervisor to build a load consists of the vehicle identification number, a description of the vehicle, and the ship by date. All of that information is provided to the dispatch/terminal supervisor by the GM Vehicle Identification Tracking Manager system (VTMS). A dispatch/terminal supervisor will take that information and enter it into an Employer computer program, called the "manual load building system." The manual load building system provides an inventory of vehicles available for loads; the semi-trucks available to transport the loads; maps indicating the load's destination; and, it allows the Employer to calculate the wage revenue for each load. Occasionally, a dealer will provide shipping information directly to the dispatch/terminal supervisor outside of the manual load building system.

⁴ The parties stipulated, and I find, that Torren White, Margo Hopkins and Dean Ellenburg are supervisors within the meaning of Section 2(11) of the Act as they each have the authority to hire and discharge employees. The parties also stipulated, and I find, that Joshua Hyland is a Supervisor within the meaning of Section 2(11) of the Act as he has the authority to effectively recommend the hiring and discipline of employees.

⁵ At hearing, the Employer averred that Rhonda Radee is a confidential employee based upon her payroll function. The Petitioner did not contest that designation and is not seeking her inclusion in the unit.

After the terminal supervisor builds a load, which generally consists of seven sport utility vehicles (SUVs) and one sedan, the as yet unassigned load will be placed on a dispatch board and drivers will bid on transporting the load and will be awarded the load based on seniority. The Local Rider contains specific procedures for how drivers are assigned a load through the bid process. Notification of the assignment is typically given to the driver via his electronic tablet as well as a paper loading document, both containing the delivery address of the shipment, as well as other related information. After this process is complete, a dispatch/terminal supervisor records that the load has been assigned on the Employer's dispatch sheet and dispatch board as well as noting to which truck the driver has been assigned.

The yard/load supervisors work in the two yards, on 3 shifts: 5:00 a.m. – 2:00 p.m.; 6:00 a.m. – 3:00 p.m.; and 3:00 p.m. – 12:00 a.m. Their primary duties essentially begin when a driver has been assigned a load. The yard/load supervisor first ensures that the loads are to capacity and meet government height and weight requirements. While not actually loading vehicles on a trailer, a yard/load supervisor confirms that the driver's trailer is being loaded in a safe manner, making sure that vehicles are strapped down correctly and that the driver has taken the necessary safety precautions while vehicles are being loaded. Yard/load supervisors will occasionally assist in loading if a driver is struggling to get the configuration of cars on his trailer, including spacing of the vehicles. In reviewing the loading of a trailer, a yard/load supervisor relies on a detailed manual issued by GM that establishes how certain vehicles are to be secured onto a truck as well the Employer's own loading guidelines. Yard/load supervisors, true to their name, spend most of their work day in the yard overseeing the vehicle loading process.

2. DISPATCH/TERMINAL SUPERVISORS

a) Assignment of Work

The duties performed by dispatch/terminal supervisors do not require the exercise of any independent judgment and do not demonstrate supervisory status. In *Oakwood Healthcare*, supra at 689, the Board clarified that the authority to assign under Section 2(11) means designating an employee to a place, such as a location, department, or wing; appointing an employee to a time, such as a shift or overtime period; or giving an employee significant overall duties. Ad hoc instruction to perform a discrete task is not assignment. The authority to make an assignment, by itself, does not confer supervisory status – the putative supervisor must also use independent judgment when making such assignments. Id. at 692-693. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data, and that “rise[s] above the merely routine or clerical.” Id.

The Employer contends that dispatch/terminal supervisors exercise sufficient authority over drivers' assignments so as to make them statutory supervisors, citing to **NLRB v. Metropolitan Petroleum Co.**, 506 F.2d 616, 617-18 (1st Cir. 1974),⁶ where the Court held that dispatchers in that case were statutory supervisors because they assigned individual drivers to tasks based upon the dispatchers' knowledge of the drivers' relative experience levels, were authorized to decide whether to assign overtime work or to postpone deliveries for a day or more, and they determined the number of employees needed each season, thereby influencing employment levels and layoffs. *Id.* at 617-619.

Unlike the dispatchers in **Metropolitan Petroleum**, dispatch/terminal supervisors herein assign loads to drivers strictly on the basis of driver seniority as required by the drivers' collective bargaining agreements. The Board has held that a purported supervisor does not exercise independent judgment when making assignments based on an employer's detailed policies, a collective-bargaining agreement, or other such directives. **Oakwood Healthcare, Inc.**, *supra* at 693. Based on his seniority, a driver can actually choose a load (or assignment) through the bid procedure set forth in the Local Rider. While there was testimony at the hearing that after being assigned a load, drivers obtained shipping documents containing a delivery address via electronic and paper loading documents, there was no evidence that dispatch/terminal supervisors determine which route the driver will take in making the delivery.

Also unlike the dispatchers in **Metropolitan Petroleum**, dispatch/terminal supervisors do not assign employees to a particular time. There is no evidence dispatch/terminal supervisors have any role in scheduling, or in setting the work hours of any particular driver. There is no record evidence that dispatch/terminal supervisors can approve requests by employees to change their hours or shifts. There is no evidence dispatch/terminal supervisors approve sick leave or vacation. There are no specific instances of dispatch/terminal supervisors approving overtime. There is no evidence that any of the dispatch/terminal supervisors can compel a driver to stay and work overtime. Such lack of specific evidence of independent judgment is construed against the Employer. **Dean & Deluca New York, Inc.**, 338 NLRB 1046, 1048 (2003). In sum, the evidence fails to establish that dispatch/terminal supervisors assign employees to a particular time. It is well established "that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to request that a certain action be taken." **Entergy Mississippi, Inc.**, 357 NLRB No. 178, slip op. at 7 (2011), citing **Golden Crest Healthcare**, 348 NLRB at 729.

In addition to not assigning employees a place or time using independent judgment, dispatch/terminal supervisors do not assign employees "significant overall job duties." The duties of the Employer's drivers are determined by their job classifications as drivers within the context of their collective bargaining agreement and not a dispatch/terminal supervisor. With respect to other employees of the Employer, such as mechanics, no evidence was presented as to

⁶ The Board is not bound by decisions by the circuit court of appeals. See **Prudential Insurance Company of America**, 119 NLRB 768 (1957); **Ranco, Inc.**, 109 NLRB 998, 1009, fn. 8 (1954); **Lenz Company**, 153 NLRB 1399 (1965).

whether a dispatch/terminal supervisor plays any role whatsoever in assigning them their duties. Although a dispatch/terminal supervisor plays a role in the assignment of a load to a driver, that role is constrained by the drivers' collective bargaining agreement, as an assignment is entirely based on a driver's seniority under that agreement, requiring no independent judgment on the part of the dispatch/terminal supervisor. Dispatch/terminal supervisors do not determine which drivers receive which loads based on the dispatch/terminal supervisor's assessment of the individual skills of the drivers, or the varying degree of difficulty of the loads. Making assignments without regard to individualized assessments of the employees' skills in relation to the work being assigned is routine and does not require independent judgment. ***Oakwood Healthcare, Inc.***, supra at 693. Thus, dispatch/terminal supervisors' authority in assigning work to drivers falls far short of the dispatchers determined to be statutory supervisors in ***Metropolitan Petroleum***.

b) Responsible Direction

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. ***Oakwood Healthcare***, supra at 691- 692. As with all of the supervisory indicia enumerated in 2(11), responsible direction must entail independent judgment. Thus, the responsible direction must be (a) independent, free of the control of others; (b) involve a judgment, that is, require forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. ***Oakwood Healthcare***, supra at 692-693. To establish accountability, the party asserting supervisory status has to show both that the putative supervisor has "the authority to take correction action" and can potentially receive "adverse consequences" for the performance errors of other employees. *Id.* For the adverse consequences to establish "responsible direction," the consequences must flow from the other employees' performance failures, not from the purported supervisor's own performance failure.

Dispatch/terminal supervisors do not responsibly direct employees. Although they do arguably have drivers working "under" them and play a minor role in their work assignments, they do not direct drivers in how to drive the transport trucks. Thus, they do not meet the criteria of "responsible" direction.

There is evidence that dispatch/terminal supervisors issue disciplines to drivers such as when they deliver the wrong vehicles or damage a vehicle as discussed in detail below. However, there is no record evidence that dispatch/terminal supervisors are held accountable for the mistakes of the drivers. Employer assistant terminal manager Hopkins testified as to performance evaluations issued to dispatch/terminal supervisors and those evaluations were introduced into evidence. While those evaluations included language regarding "accountability", there was no testimony as to what the dispatch/terminal supervisor was accountable for and no evidence was presented that a dispatch/terminal supervisor received discipline due to a driver improperly loading a vehicle onto a transport truck, delivering the wrong vehicles or any other malfeasance on the part of a driver. Furthermore, there is no evidence on record of any potential

adverse consequences to a dispatch/terminal supervisor for the performance mistakes of other employees, nor was there any evidence presented at hearing that the dispatch/terminal supervisors, or any of the other disputed supervisors, have been informed that they could receive adverse consequences for another employee's performance mistakes. The Board has declined to find accountability where the putative supervisor has never been informed of the prospect of

adverse consequences for the poor performance of other employees. See *Rockspring Development, Inc.*, 353 NLRB 1041, 1042 (2009).

Even assuming the dispatch/terminal supervisors were held accountable for the mistakes of the drivers, they do not meet the third criteria of exercising independent judgment in providing direction to the drivers. As previously noted, to the extent that a dispatch/terminal supervisor provides direction to drivers, that direction must conform to the instructions provided by GM, the driver's collective-bargaining agreement, as well as the Employer's own procedures. These limitations on the dispatch/terminal supervisors' authority reflect a lack of independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB at 693; *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op at 2(2014).

c) Discipline

The Employer asserts that dispatch/terminal supervisors exercise independent judgment and discretion because they effectively recommend discipline as well as issue disciplines themselves, citing *In Re Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1045 (2003). The Board in *Progressive Transportation Services* found that a deck lead supervisor was a supervisor within the meaning of Section 2(11) of the Act when she exercised independent judgment to effectively recommend discipline by initiating the discipline process by bringing rule infractions and misconduct to the attention of the operations manager who then determined the level of discipline, finding that Section 2(11) requires only that a supervisor effectively recommend discipline and is not required to have the final authority to impose it. *Id.* at 1046.

Although dispatch/terminal supervisors have signed a number of reprimands, joint meeting reports and notices of probation/investigation reports to drivers, particularly since August 2014, unlike the deck lead supervisor in *Progressive Transportation Services*, they did not initiate the vast majority of the disciplines. Instead, those disciplines were almost always initiated by Autoport, which provided the information regarding a damaged vehicle, misdelivery, etc., to the dispatch/terminal supervisor, who in turn provided a discipline to the driver as set forth in the Supplemental Agreement. Moreover, there are no record examples of dispatch/terminal supervisors exercising independent judgment in writing the discipline, as after Autoport notifies the dispatch/terminal supervisor of a driver's contract or rule violation, the discipline is then printed on a form that contains the specific article in the Supplemental Agreement that has been violated and the discipline meted out for the offense is in accordance with that provision. Moreover, unlike the deck lead supervisor in *Progressive Transportation Services* who decided to forego discipline in some instances, there is no evidence that a dispatch/terminal supervisor has any discretion as to whether or not to print out the discipline once Autoport notifies him of a driver's contract or rule violation. Thus, dispatch/terminal

supervisors are merely performing a clerical function and not exercising independent judgment in the discipline of drivers. See *Fleming Cos., Inc.*, 330 NLRB 277, fn. 1 (1999).

In regard to the two instances of discipline where no specific section of Article 40 of the Supplemental Agreement is indicated, (Employer exhibits 43 and 48), Article 40 addresses the scenarios described in the disciplines. The authority to issue discipline pursuant to the terms of a collective-bargaining agreement which dictates the level of discipline to be imposed for various offenses does not involve the use of independent judgment and thus is not supervisory disciplinary authority. *Oakwood Healthcare*, 348 NLRB at 731; see also *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op at 7-8 (2012) (restricted and sporadic authority limited to predetermined types of conduct does not require the use of independent judgment); *The Wackenhut Corp.*, 345 NLRB 850, 854 (2005), (issuing warnings that consistently cited to specific, enumerated regulations that mandated the type of discipline to be issued in each particular instance, did not reflect the use of independent judgment and did not make the individual a supervisor). Moreover, evidence adduced at the hearing confirmed that Scott Lokker, the dispatch/terminal supervisor who signed the disciplines in Employer exhibits 43 and 48, had no part in the investigation leading up to the discipline, his role essentially limited to passing it on to the drivers.

Assistant terminal manager Hopkins testified that she did not play a role in any of the issuance of the disciplines. However, the record fails to reflect whether the reprimands were reviewed by other persons in upper management. Because there is no record of whether the disciplines were reviewed by upper management and whether the level of corrective action reflected the input of higher management, the reprimands have little probative value and do not establish by a preponderance of the evidence that the dispatch/terminal supervisors possess disciplinary authority. See *Trinity Continuing Care Services*, 359 NLRB No. 162, slip op at 5 (2013). Additionally, a driver can file a grievance over any of the types of disciplines noted above, and the dispatch/terminal supervisors are not involved in the grievance process.

The Employer also cites to *Pennsylvania Truck Lines, Inc.*, 199 NLRB 641, 642 (1972), where the Board found that strip supervisors and dispatchers were statutory supervisors because they had the authority to discharge drivers on the spot for serious misconduct, such as drunkenness or refusal to perform assigned work. *Id.* No evidence was presented at hearing that dispatch/terminal supervisors have ever discharged a driver on the spot for any reason or possess the authority to do so. Moreover, the Board has consistently found that the authority to order intoxicated or insubordinate employees to leave the workplace does not constitute the statutory authority to discipline employees, as such violations are so egregious and obvious that little independent judgment is needed. *Northcrest Nursing Home*, 313 NLRB 491, 497-498 (1993); *Great Lakes Towing Co.*, 165 NLRB 695 (1967).

3. YARD/LOAD SUPERVISORS

a) Assignment of Work

Yard/load supervisors do not assign drivers or any other employee to a particular place or

location. Although assistant terminal manager Hopkins testified that a yard/load supervisor confirms that the driver's trailer is being loaded in a safe manner, that vehicles are strapped down correctly and that the driver has taken the necessary safety precautions while vehicles are being loaded onto his truck, no evidence was presented that they direct drivers or any other employee to a place or specific location, as required under *Oakwood Healthcare*, supra at 689.

Similar to my findings with regard to dispatch/terminal supervisors, there was no evidence presented that yard/load supervisors assign employees to a particular time. In this regard, there was not any testimony presented at hearing that yard/load supervisors could send employees home if there is not enough work or if the work has been completed for the day. Nor was evidence presented that yard/load supervisors determine employees' schedules or approve employees' requests for time off. As such, the Employer has not established that yard/load supervisors play any part at all with respect to assigning employees to a particular time as required. Such lack of specific evidence of independent judgment is construed against the Employer. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

In addition to not assigning a place and time, the yard/load supervisors do not assign employees significant overall duties. Nor is there any record evidence of yard/load supervisors making assignments based on an individualized assessment of the employees' skills in relation to the work being assigned. The Employer has failed to meet its burden of establishing yard/load supervisors assign employees using independent judgment. *Oakwood Healthcare, Inc.*, supra at 693; see also *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op at 8 (2012).

b) Responsible Direction

There is no record evidence of employees reporting directly to the yard/load supervisors, although yard/load supervisors do provide some direction to employees by assisting drivers in loading vehicles on the trucks within the safety guidelines of GM, Autoport and the Employer. However, the Employer has not established how this is done, or how often.

While yard/load supervisors do provide some direction to employees, they do not do so responsibly, or through the exercise of independent judgment. Yard/load supervisors can issue disciplines to employees for such things as not shipping the correct vehicles, as detailed in the section below. However, there is no record evidence the yard/load supervisors are held accountable for the performance mistakes of other employees. There is no evidence any yard/load supervisor has been disciplined or has received other adverse consequences due to the performance mistakes of other employees. As with the dispatch/terminal supervisors, assistant terminal manager Hopkins testified to the "accountability" aspect of a yard/load supervisor's performance evaluation. Again, as with the dispatch/terminal supervisors, no evidence was presented as to how a yard/load supervisor was accountable or whether they received discipline for a driver's violation of the Uniform Rules and Regulations in the Supplemental Agreement, Article 40, or Employer policies, or if they have been informed that they could receive adverse consequences for another employee's performance mistakes. Such conclusory testimony about the yard/load supervisors' authority, without detailed, specific evidence of them exercising independent judgment, is insufficient to establish supervisory authority. *Golden Crest*

Healthcare Center, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer presented evidence of one yard/load supervisor drafting yard rules for drivers, other yard personnel, and especially for “backhaulers” (Employer drivers from other terminals) which were posted at both the CN and LGR yards. Those yard rules arguably offered direction to drivers and other yard personnel. However, those rules were first submitted to Employer management for approval before they were posted. Moreover, those rules, written for employees and non-employees alike, essentially restated yard rules from Autoport and AIM, a company that works for GM along with Autoport in performing vehicle inspections at the Employer’s two yards, as well as providing supply information. Restating Employer rules is a clerical function and does not constitute responsible direction. See *Oakwood Healthcare*, supra at 692-693. Thus, the Employer has failed to meet its burden of establishing that the yard/load supervisors have the supervisory authority to responsibly direct employees.

c) Discipline

The Employer asserts the yard/load supervisors have the authority to discipline employees. In this regard, it entered into evidence a number of reprimands, joint meeting reports and notices of probation/investigation reports, all signed by a yard/load supervisor. In support of its assertion, the Employer cites *Venture Industries, Inc.*, 327 NLRB 918, 919-920 (1999), in which the Board found line and department supervisors to be statutory supervisors because they possessed the authority to issue oral or written reprimands to employees concerning production and attendance. *Id.* The Board noted that when a supervisor decides to issue a reprimand, he discusses it with the employee, has the employee sign it and then sends it to the human resources department to be placed in the employee’s personnel file. *Id.*

The operative words in the *Ventures Industries* case are “when a supervisor decides to issue a reprimand.” As with the dispatch/terminal supervisors, there was no evidence that yard/load supervisors “decide” to discipline a driver but rather follow a set procedure dictated by the drivers’ collective bargaining agreement. In the case of cargo, vehicle, or property damage, or other incidents involving drivers, typically Autoport or AIM, will notify a yard/load supervisor of vehicle damage occurring in one of the two yards. The yard/load supervisor then codes the damage based on guidelines provided by GM as well as the Employer’s own guidelines and obtains a repair order for the vehicle, takes pictures of the damage if the driver has not provided any and then assembles a file and takes it over to the terminal for review by the terminal manager. Currently, with respect to any vehicle damage, the yard/load supervisor will go to the terminal manager who decides the driver’s level of punishment based on the terms of the drivers’ collective bargaining agreement, although the yard/load supervisor signs the discipline. A number of the reprimand notices, like those signed by the dispatch/terminal supervisors noted above, are on a printed form that contains a specific provision in Article 40 of the Supplemental Agreement that has been violated. There is no evidence that a yard/load supervisor has the discretion not to issue discipline for contractual violations, or can decide not to follow the contract with respect to the level of discipline set forth in the contract. Thus *Venture Industries* is inapplicable to the instant facts.

All of the exhibits entered into evidence by the Employer with respect to disciplines signed by a yard/load supervisor were written by two yard/load supervisors, Dan Beem and Patrick Fischer. It was not clear from the record whether the third yard/load supervisor has similarly signed disciplines or has the authority to do so.

With respect to those disciplines that do not cite to specific contractual language, they were all signed by yard/load supervisor Dan Beem. Beem testified that, with respect to the disciplines he signed, he believes that he went to the terminal manager who reviewed the file and determined the level of punishment for the driver in question. Terminal manager Torren White's testimony conflicted with Beem's to an extent, when he testified that Beem was responsible for determining a driver's level of punishment in all cases that involve less than \$2000 in damage.⁷ However, the Employer failed to provide evidence as to what specific role, if any, Beem, or any yard/load supervisor, played in determining discipline or effectively recommending discipline even for those incidents that involve less than \$2000 in damage, specifically with regard to his use of any independent judgment. Any evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), *enfd.* in relevant part 156 F. Ed 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Thus, given its unsupported assertions, the Employer failed to present specific evidence of yard/load supervisors using independent judgment in issuing reprimands, joint meeting reports and notices of probation/investigation reports. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006).

d) Recommendation to Hire

The Employer asserts that yard/load supervisors have the authority to effectively recommend hiring. Assistant terminal manager Hopkins testified that yard/load supervisor Dan Beem went to terminal manager White and vouched for a friend who had put in an application with the Employer. The friend was subsequently hired. The record does not reflect who made the final decision on hiring, or what went into the decision on hiring. There is no evidence that Beem's friend or anyone else was hired solely on his recommendation without any independent review or investigation by higher management; therefore the record fails to reflect he has the authority to effectively recommend on hiring decisions. *Children's Farm Home*, 324 NLRB 61 (1997); see also *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

4. SECONDARY SUPERVISORY INDICIA OF DISPATCH/TERMINAL SUPERVISORS AND YARD/LOAD SUPERVISORS

The Employer contends that in addition to their statutory authority to assign work, issue

⁷ White testified that with respect to all incidents that involve damage over \$2000, he, not Beem, decides the driver's level of punishment based on the terms of the drivers' collective bargaining agreement. White further testified that Beem is currently being trained and in the future Beem himself will make these disciplinary decisions. However, and even assuming that these plans come to fruition at some unspecified time in the future, I am unwilling to speculate whether the performance of this function would be sufficient to confer supervisory status. See *Board of Social Ministry*, 327 NLRB No. 57 (1998).

disciplines and effectively recommend hire, dispatch/terminal supervisors and yard/load supervisors possess additional, secondary indicia to support their statutory supervisory status, including the fact that they attend supervisory meetings twice a week, are salaried, the Employer contributes to their 401(k) plan, they undergo a different performance evaluation process, they attend drug and alcohol impairment training, are issued an employee handbook that is only used for non-bargaining unit personnel and the Employer's most recent posts in seeking to hire them, included the words, "Supervisory experience preferred. . ." While the Board has examined secondary indicia not set forth in Section 2(11) of the Act, these secondary factors, without more, are insufficient to establish supervisory status. *International Transportation Service, Inc.*, 344 NLRB 279, 285 (2005), enf. denied on other grounds, 449 F.3d 160 (2006); *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000). With respect to dispatch/terminal supervisor and yard/load supervisor job descriptions, even if they do suggest the presence of supervisory authority, the expansive power set forth in the documents is at odds with the realities. The Board has long cautioned that evidence of actual authority trumps mere paper authority. *Avante at Wilson*, supra at 1057; *Golden Crest Healthcare*, supra at 731; *Valley Slurry Seal Co.*, 343 NLRB 233, 245 (2004); *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002); *Training School at Vineland*, supra at 1416.; *Chevron U.S.A., Inc.* 309 NLRB 59, 69 (1992).

II. CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,⁸ I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time dispatch/terminal supervisors and yard/load supervisors employed by the Employer at its facility located at 9151 Billwood Highway, Dimondale, Michigan; but excluding maintenance supervisors, payroll

⁸ Both parties timely filed briefs, which were carefully considered.

clerks, professional employees, confidential employees, all other employees and guards and supervisors as defined in the Act.⁹

Dated at Detroit, Michigan, this 23rd day of January 2015.

Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

⁹ The Unit description appears as amended at hearing.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **LOCAL 580, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **January 30, 2015**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, **www.nlrb.gov**,¹⁰ by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

¹⁰ To file the eligibility list electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **February 6, 2015**. The request may be filed electronically through the Agency's website, **www.nlr.gov**,¹¹ but may **not** be filed by facsimile.

¹¹ To file a Request for Review electronically, go to the Agency's website at **www.nlr.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.